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No. 98-835

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JANET RENO, ET AL.,

Petitioners,

v.

RAUL PERCIRA GONCALVES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION.

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COUNTER STATEMENT OF THE QUESTIONS PRESENTED

Respondent, a legal permanent resident for twenty-six years, was ordered deported based on the Attorney General's retroactive application of a 1996 amendment to the Immigration and Nationality Act (INA) that has been rejected by the First and Second Circuit Courts of Appeals, by numerous district courts, and by the Board of Immigration Appeals sitting *en banc*. The government contends that no court has jurisdiction to review the Attorney General's retroactivity decision and thereby to determine the lawfulness of respondent's final order of deportation. By insisting that Congress has repealed all statutory grants of jurisdiction to review the Attorney General's decision, the government's petition raises constitutional questions that the First Circuit deemed "novel, complex and serious" and successfully and appropriately avoided.

The questions presented are:

1. Whether the Antiterrorism and Effective Death Penalty Act (AEDPA) or the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) repealed the jurisdiction of both the district courts and the courts of appeals over a statutory and constitutional challenge to a final deportation order and, if so, whether such repeal violates the Suspension Clause, Article III or the Due Process Clause of the Constitution?

2. Whether the court of appeals correctly found that AEDPA Section 440(d) does not apply retroactively and, if applicable, whether Section 440(d) violates equal protection?

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OPINIONS BELOW

Respondent adopts the petitioner's statement of the opinions below.

JURISDICTION

Respondent does not contest this Court's jurisdiction under 28 U.S.C. § 1254(1).

COUNTER STATEMENT OF THE CASE

Respondent, Raul Percira Goncalves, is a citizen of Portugal who has been a legal permanent resident of the United States for twenty-six years. He lawfully entered the United States with his parents and siblings as a three-year old child. C.A. App. 45-46.[1] His father died when respondent was five (C.A. App. 46, 71), and he was raised by his mother who is afflicted with a mental illness diagnosed as schizoaffective disorder. C.A. App. 29, 47, 71. Respondent is an alcoholic. In June of 1992, he acknowledged his alcoholism, began attending Alcoholics Anonymous (AA), and earned his General Equivalency Diploma. C.A. App. 55, 104. He has been employed in construction since 1994, remains sober and continues to attend AA meetings. C.A. App. 55-58, 79. Respondent is married to a United States citizen, has an American-born child, has never returned to Portugal and has no immediate family there. C.A. App. 7, 45, 67.

In 1990, before the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (AEDPA) was enacted, the INS commenced deportation proceedings against respondent based on his convictions of two or

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[1] As in the government's petition, "C.A. App." refers to the record appendix filed in the court below.

more (non-violent) crimes of moral turpitude. Pet. App. 6a. Respondent conceded deportability in 1994. He was eligible for and submitted a request for relief from deportation under Section 1182(c). The Immigration Judge (IJ) denied the application in the exercise of discretion, and respondent timely appealed to the Board of Immigration Appeals (BIA) in 1995, which exercises discretion *de novo* under Section 1182(c). *See Matter of Adetiba*, 20 I&N Dec. 506 (BIA 1992).

While the application was pending before the BIA, Congress enacted AEDPA. In March 1997, the BIA dismissed respondent's appeal pursuant to the Attorney General's decision in *Matter of Soriano*, which applied Section 440(d)[2] retroactively, and issued a final order of deportation on the ground that respondent's eligibility for relief had been eliminated by AEDPA. Respondent was taken into custody for deportation in June 1997.[3]

This case concerns substantive and jurisdictional amendments to the Immigration and Nationality Act (INA) made in 1996 by AEDPA and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, affecting legal permanent resident immigrants who are deportable based on certain criminal convictions.

The substantive issues are whether changes in statutory eligibility criteria for relief from deportation apply retroactively to applications that were pending when the amendments were enacted and whether the restrictions on relief create a distinc-

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[2] All references to Section 440(d) of AEDPA include technical amendments made by IIRIRA Section 306. These amendments were effective as if included in AEDPA, and without them Mr. Goncalves would have retained eligibility for relief as his crimes were not committed within five years of entry. Pet. App. 87a-88a.

[3] Respondent was released from immigration custody on May 28, 1998.

tion that violates equal protection. The jurisdictional issue is whether Congress repealed all federal court jurisdiction over the statutory retroactivity and the constitutional equal protection challenges to respondent's deportation order and, if so, whether such repeal violates the Constitution.

1. Substantive Effects of AEDPA and IIRIRA.

Prior to the enactment of AEDPA, a legal permanent resident could apply for relief from deportation in the event certain criminal acts rendered him deportable. 8 U.S.C. § 1182(c) (1994). Although the ultimate grant of relief was left to the discretion of the Attorney General, if the legal resident had resided in the United States for seven consecutive years and was not convicted of an "aggravated felony" for which he had actually served five years, he had a statutory entitlement to apply. *Id.* Furthermore, the grant of relief was not uncommon. From 1989 to 1994 over half of the applications for relief were approved. *Mojica* v. *Reno*, 970 F. Supp. 130, 178 (E.D.N.Y., 1997) (citing U.S. Dept. of Justice Executive Office for Immigration Review Statistical Sheet 1, Jan. 19, 1995), *aff'd*, *Henderson* v. *INS*, 157 F.3d 106 (2d Cir. 1998).

In 1996, AEDPA 440(d) expanded the prohibition on eligibility for relief by adding a wide range of disqualifying criminal convictions.[4] Respondent was eligible to apply for Section 1182(c) relief under the pre-AEDPA provision and was precluded from eligibility under the prohibition enacted by Section 440(d).

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[4] Section 440(d) of AEDPA amended Section 1182(c) to provide that an alien who "is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241 (a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i)" is not eligible for relief.

Continued eligibility for relief from deportation for respondent depends upon whether the new restrictions on eligibility apply retroactively to immigrants who applied for relief before AEDPA was enacted. The BIA ruled en banc on that question. In a precedent decision applicable to all cases, it held that Section 440(d) did not apply retroactively to applications pending when AEDPA was enacted. *In re Soriano*, Int. Dec. 3289 (June 27, 1996). Pet. App. 91a. At the request of the INS the Attorney General vacated the BIA's decision. Pet. App. 124a. Five months later she issued a nationally-applicable ruling that AEDPA's new restrictions applied to all cases, including those where "an application was pending when AEDPA was signed into law." *Matter of Soriano*, Int. Dec. 3289 (A.G., Feb. 21, 1997). Pet. App. 128a.

Section 440(d), which refers only to "deportable" aliens, also raised the question of whether it applies to immigrants subject to "exclusion" rather than "deportation" proceedings. The BIA held, in a different proceeding, that the plain words of Section 440(d) restricted its coverage to deportable aliens. *In re Fuentes-Campos*, Int. Dec. 3318 (May 14, 1997).

Five months after AEDPA, Congress enacted IIRIRA. It went into effect on April 1, 1997. On its effective date, IIRIRA repealed the underlying provision amended by Section 440(d) (INA Section 1182 (c)) and replaced it with a new form of relief from deportation entitled "cancellation of removal". 8 U.S.C. § 1229b.[5]

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[5] "Cancellation of removal" applies to aliens against whom administrative deportation (now removal proceedings) are commenced beginning April 1, 1997. Section 1229b provides:

"(a) Cancellation of Removal for Certain Permanent Residents"

> The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien-

2. Judicial Review After AEPDA and IIRIRA

AEDPA and IIRIRA also amended the INA provisions regarding federal court jurisdiction to review deportation and exclusion orders. Before AEDPA and IIRIRA, judicial review of final orders of deportation and exclusion was governed by 8 U.S.C. § 1105a. Section 1105a provided that any alien subject to a final order of deportation, regardless of the basis for the order, was entitled to obtain judicial review by a petition for review directly in the court of appeals, 8 U.S.C. § 1105a(a) (1994), or by habeas corpus proceedings if the alien was held in custody. 8 U.S.C. § 1105a(a)(10) (1994). The habeas corpus provision was in addition to the direct review procedure, and the courts disagreed about when an alien could invoke habeas corpus.[6]

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(1) has been an alien lawfully admitted for permanent residence for not less than five years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony."

Permanent residents' eligibility for "cancellation of removal" under IIRIRA is less restrictive in some respects than eligibility for Section 1182 (c) under AEDPA because IIRIRA excludes only "aggravated felony" convictions.

[6] Compare *Nakaranurack* v. *INS*, 68 F.3d 290 (9th Cir. 1995) (finding habeas jurisdiction to review denial of discretionary relief in final deportation order) and *Williams* v. *INS*, 795 F.2d 738 (9th Cir. 1986) (same), with *Galaviz-Medina* v. *Wooten*, 27 F.3d 487 (10th Cir. 1994) (limiting habeas jurisdiction to constitutional claims regarding collateral matters), and *Daneshvar* v. *Chauvin*, 644 F.2d 1248 (8th Cir. 1981) (limiting habeas jurisdiction to review of discretionary decisions in collateral matters).

a. AEDPA amended the Section 1105a jurisdictional provisions of the INA in two ways. First, it repealed the habeas corpus provision in Section 1105a(a)(10). Second, it enacted a new provision stating that a final order against an alien deportable on certain criminal grounds "shall not be subject to review by any court." AEDPA 440(a). AEDPA's provisions went into effect upon enactment on April 24, 1996. Based on that provision, the First Circuit and other courts of appeals dismissed pending petitions for review on the ground that Congress had repealed their direct review jurisdiction.[7]

The government does not mention that the INS sought dismissal of these cases on the ground that the circuit courts no longer had jurisdiction and that immigrants objected to dismissal because denial of direct review would violate their constitutional right to a judicial forum for challenging their deportation orders. *See, e.g., Kolster*, 101 F.3d at 790-91.[8] In the First Circuit, the INS affirmatively stated that it would assume that the district courts retained jurisdiction to review some claim in a habeas corpus proceeding.[9] In other circuits, the INS sought dismissal of cases raising constitutional claims. *See Chow* v. *INS*, 113 F.3d 659, 668 (7th Cir. 1997). In response to the

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[7] See *Kolster* v. *INS*, 101 F.3d 785 (1st Cir. 1996). See also *Mansour* v. *INS*, 123 F.3d 423 (6th Cir. 1997); *Turkhan* v. *INS*, 123 F.3d 487 (7th Cir. 1997); *Fernandez* v. *INS*, 113 F.3d 1151 (10th Cir. 1997); *Salazar-Haro* v. *INS*, 95 F.3d 309 (3d Cir. 1996); *Hincapie-Nieto* v. *INS*, 92 F.3d 27 (2d Cir. 1996).

[8] See also *Mansour*, 123 F.3d at 25-26; *Turkhan*, 123 F.3d at 489-90; *Fernandez*, 113 F.3d at 1154-55; *Boston-Bollers* v. *INS*, 106 F.3d 352, 354 (11th Cir. 1997); *Duldulao*, 90 F.3d 396, 399-400 (9th Cir. 1996); *Salazar-Haro*, 95 F.3d at 310-11; *Hincapie-Nieto*, 92 F.3d at 30-31.

[9] The INS did not specify the statutory basis for habeas review in the district courts.

INS's arguments, the circuit courts dismissed petitions for review, but found that the elimination of their own direct review did not foreclose all avenues for an immigrant to challenge a deportation order because of the possibility of alternative avenues, including habeas corpus, for judicial intervention. *See Kolster*, 101 F.3d at 790.[10] In several cases, immigrants sought review by this Court of the circuit courts' dismissals based on their constitutional right to judicial review under various constitutional provisions, including the Suspension of Habeas Corpus Clause. The government opposed *certiorari* on the ground, *inter alia*, that any claim for review under the Suspension of Habeas Corpus Clause should await the filing of a habeas corpus petition.[11]

b. IIRIRA enacted further changes to the INA's judicial review provisions. For administrative proceedings commenced on or after IIRIRA's effective date, April 1, 1997, it repealed Section 1105a and adopted a new permanent judicial review statute, Section 1252. The permanent provision and the various subsections cited by the government (with the arguable exception of subsection (g)) *see* Pet. Br. 5, apply *only* to cases where the immigration proceeding is initiated on or after April 1,

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[10] See also *Mansour*, 123 F.3d at 425-26; *Williams* v. *INS*, 114 F.3d 82, 83-84 (5th Cir. 1997); *Fernandez*, 113 F.3d 1155; *Chow* v. *INS*, 113 F.3d 659, 668-69 (7th Cir. 1997); *Salazar-Haro*, 95 F.3d at 311; *Hincapie-Nieto*, 92 F.3d at 30-31; *Duldulao*, 90 F.3d at 399-400.

[11] The government argued in opposition to *certiorari* that a claim that the Suspension of Habeas Corpus Clause provided immigrants with a constitutional right to review of their claims was not properly presented because petitioners "ha[d] not sought a writ of habeas corpus." Brief for the Respondent [INS] in Opposition at 9, *Qasguargis* v. *INS* (No. 96-806) (filed Jan. 1997), *cert. denied*, 519 U.S. 1148 (Feb. 1997); Brief for the [INS] at 15, *Chamorro-Torres* v. *INS* (No. 96-985) (filed Jan. 1997), *cert. denied*, 520 U.S. 1103 (Jan.1997) (same); Brief for the [INS] at 23, *Katsoulis* v. *INS* (No. 97-379) (filed Nov. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 624 (1997) (same).

1997.[12] For those cases (if the BIA issues its final order after October 30, 1996),[13] IIRIRA enacted "transitional" judicial review rules amending the existing Section 1105a judicial review procedures. Both the permanent and transitional provisions of IIRIRA preserve the courts of appeals as the primary route for judicial review of final orders of deportation or removal.

IIRIRA restricts review of deportation orders based on enumerated criminal grounds. The transitional rules provide:

> there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in [enumerated INA sections].

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[12] IIRIRA 309 (a) & (c). One subsection of the permanent judicial review statue has a separate effective date provision. Section 1252(g) provides:

(g) Exclusive jurisdiction

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

IIRIRA 306(c) provides that:

"subsection (g) of section ([1252] . . .), shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act." In a different context the applicability of Section 1252(g) to pending cases is presented in *Reno* v. *AADC*, No. 97-1252 (9th Cir.) (argued Nov. 4, 1998).

[13] Section 309(a), (c)(1) & (4).

IIRIRA 309(c)(4)(G). The successor provision in the permanent IIRIRA statute appears at 8 U.S.C. § 1252(a)(2)(C).[14]

Based on this provision, the courts of appeals reiterated their earlier rulings that their own jurisdiction over petitioner for review, including constitutional claims, had been repealed.[15] The government again fails to note that the courts of appeals dismissed petitions for review over the objection of immigrants that elimination of such review would violate their constitutional right to a judicial forum to present constitutional and non-constitutional claims. The government now contends constitutional equal protection claims are reviewable in the courts of appeals. *Compare* Pet. 19-20 with *Goncalves*, Pet. App.10a The courts noted that alternative grounds for seeking review, in particular in district court habeas corpus actions, was not foreclosed.

3. Substantive and Jurisdictional Analysis in the Court Below.

Respondent filed a writ of habeas corpus under 28 U.S.C. § 2241 to challenge the order of deportation. He asserted that (1) the Attorney General's ruling in *Soriano* erred as a matter

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[14] Section 1252(a)(2)(C):

"ORDERS AGAINST CRIMINAL ALIENS.- Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 212(a)(2) or 237(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 237(a)(2)(A)(ii) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 237(a)(2)(A)(I)."

[15] See, e.g., *Lerma de Garcia* v. *INS*, 141 F.3d 215, 217 (5th Cir.), *reh'g denied*, 159 F.3d 1358 (1998); *Turkhan* v. *INS*, 123 F.3d 487, 490 (7th Cir. 1997).

of law in holding that AEDPA 440(d) applied retroactively to applications for relief filed before AEDPA's enactment, and (2) irrespective of whether Section 440(d) applies retroactively, that it violates Equal Protection by depriving deportable but not excludable legal resident immigrants of eligibility for discretionary relief. The district court dismissed the petition, finding that it lacked jurisdiction and that respondent's claims were not meritorious. Pet. App. 75a.

In the court of appeals, the INS asserted that no court had jurisdiction over either claim. It argued that respondent's retroactivity claim could not be heard in either the district court in a habeas corpus action or in the court of appeals by petition for review. In addition, contrary to its position here, the INS asserted that both the district court and the court of appeals lacked jurisdiction over respondent's constitutional equal protection claim because direct review in the court of appeals remained only for "substantial" constitutional claims causing a fundamental miscarriage of justice and that respondent's claim was not substantial. Pet. App. 18a-19a. The First Circuit, finding that "serious, novel and complex constitutional issues," Pet. App. at 28a, would be presented if respondent's claims were not reviewable, avoided the constitutional issues by finding that under the express repeal rule of *Felker* v. *Turpin*, 518 U.S. 651 (1996) and *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869), IIRIRA had not repealed district court jurisdiction under 28 U.S.C. § 2241 to hear both of respondent's claims.

The court of appeals found that the respondent's petition "raised pure issues of law". Pet. App. at 11a. It reaffirmed its prior holding that IIRIRA had repealed the circuit courts' direct review jurisdiction, but held IIRIRA had not repealed district court jurisdiction under 28 U.S.C. § 2241 to hear both of respondent's claims. The court stressed "there is no question that . . . Section 2241 provides a basis for reviewing immigration decisions" Pet. App. 21a, that the language of 2241(c)(1) and (c)(3) encompasses respondent's claims, and that Congress had

not repealed Section 2241 in light of the express repeal rule of *Felker* v. *Turpin*, 518 U.S. 651 (1996), and *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869).

On the merits, the court of appeals gave deference to the Attorney General's interpretation under *Chevron* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984), but held that the Attorney General had erred. The First Circuit applied *Landgraf* v. *U.S.I. Film Products*, 511 U.S. 244 (1994), as clarified in *Hughes Aircraft Co.* v. *U.S. ex rel. Schumer*, 520 U.S. 939 (1997), and *Lindh* v. *Murphy*, 521 U.S. 320 (1997), and, using "traditional tools of statutory construction," Pet. App. 41a, found that the language and structure of AEDPA, as confirmed by the legislative history, demonstrated that Section 440(d)'s new restrictions on relief did not apply to pending applications.[16]

REASONS FOR DENYING THE WRIT

Review is not warranted because there is no conflict among the circuits on either the jurisdictional question[17] or the retroactivity of Section 440(d), because both issues arise from interim statutory provisions that apply only to transitional cases governed by expiring substantive and jurisdictional statutes, and because the court of appeals decision was correct on both the jurisdiction and the merits and thereby properly avoided constitutional issues with respect to both parts of the case.

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[16] The Second Circuit in *Henderson* v. *INS*, 157 F.3d 106, 129 (2d Cir. 1998), agreed that Congress did not intend Section 440(d) to apply retroactively to applications for relief pending when the law changed, or to immigrants placed into proceedings before the date.

[17] As discussed below, the Ninth Circuit has, since the filing of the government's petition, withdrawn the panel opinion in *Hose* v. *INS*, 1998 Daily Journal D.A.R. 12215.

The First Circuit's ruling avoided constitutional questions concerning the right to judicial review and the scope of such review under the Suspension Clause, Article III and due process by placing jurisdiction in the district court pursuant to 28 U.S.C. § 2241. The instant setting, involving temporary INA rules whose provisions are sufficiently uncertain that the government itself has wavered in their interpretation, is not an appropriate vehicle for the Court to consider far reaching constitutional questions of Congress's power to limit judicial review of executive detention that would arise if Congress had repealed all grants of jurisdiction, including Section 2241. The First Circuit's merits decision that Section 440(d) does not apply retroactively to a now-repealed provision of the INA is based on the established tests for determining retroactivity and avoids questioning the constitutionality of Section 1182(c) under the equal protection standard that the courts of appeals have uniformly applied to that provision since 1976.[18]

1. The Jurisdictional Issue is Not Worthy of Review.

The jurisdictional question is whether *any* court, and if so which court, has jurisdiction over a pure question of statutory construction adopted by the Attorney General that imposes a rule of general applicability governing deportation proceedings and mandating the deportation of longtime legal residents of the United States. The government now concedes, contrary to its position below, that the court of appeals (but not the district court) has jurisdiction over respondent's constitutional equal protection claim. But the government asserts that *no court* may review the Attorney General's decision (held to be erroneous by the First and Second Circuits and numerous district courts) that Section 440(d) applies retroactively to deprive respondent

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[18] See *Francis* v. *INS*, 532 F.2d 268, 272 (2d Cir. 1976).

of *statutory eligibility* for relief from deportation. The government agrees that respondent was eligible for relief from deportation under Section 1182(c) when he applied and that the BIA is required to exercise *de novo* discretion over respondent's claim if he remains eligible. The government insists, nonetheless, that no court can hear whether the Attorney General adopted an incorrect rule of law that deprives respondent of the statutory entitlement to apply for relief. The First, Second, and Ninth Circuits have uniformly rejected that jurisdictional contention.

The government's objection to placing review in the district courts fails to note that the INS consistently sought dismissal of petitions for review (even in cases with constitutional claims where it now concedes that court of appeals jurisdiction is proper) over the objection of immigrants seeking to preserve that route, that it moved for dismissal in the First Circuit on the assumption that habeas corpus provided an alternative avenue for review, that it opposed resolution by this Court of the rights guaranteed by the Suspension Clause until immigrants filed habeas corpus actions, and that it has not offered a construction of Section 309(c)(4)(G) that allows judicial review of respondent's generic statutory claim of general applicability without resolution of complex constitutional questions of historic dimension.

a. There is no conflict among the circuit courts on either of the two jurisdictional questions the government presents: whether respondent may litigate his retroactivity and equal protection claims and, if so, in what forum those claims may be brought. Pet. Br. at 6-7. Three courts of appeals, the First, Second, and Ninth, have squarely addressed both questions and agree that immigrants subject to a final order of deportation are entitled to judicial review of both the statutory and constitutional claims. All three courts also held that the proper forum is the district court pursuant to 28 U.S.C. § 2241. *See* Pet. App. 1a; *Magaña-Pizano* v. *INS*, 152 F.3d 1213 (9th Cir.1998);

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Henderson v. *INS*, 157 F.3d 106 (2d Cir. 1998). Six additional courts of appeals are now considering habeas corpus appeals that raise the identical jurisdictional (and merits) claims as are presented here.[19] Consideration by this Court is premature unless and until an actual conflict between the circuits emerges.[20] *Cf. Layne & Bowler Co.* v. *Western Well Works, Inc.*, 261 U.S. 387 (1923).

The only appellate decision that the government contends presents a conflict is the Ninth Circuit's panel opinion in *Hose* v. *INS*, 141 F.3d 932 (9th Cir. 1998). However, subsequent to the filing of the government's petition for certiorari, the Ninth Circuit withdrew its opinion and granted rehearing en banc in

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[19] *LaGuerre* v. *INS*, No. 98-1954 and *Avelar-Cruz* v. *Reno*, No. 98-2613 (7th Cir.) (Argued & submitted Oct. 29, 1998); *Gutierrez-Martinez* v. *INS*, No. 98-8185 and *Mayers* v. *Reno*, No. 97-5537 (11th Cir.) (argued & submitted Oct. 8, 1998); *Sandoval* v. *Reno*, No. 98-1099 (3d Cir.) (argued & submitted Sept. 28, 1998); *Shah* v. *Reno*, No. 98-2636 (8th Cir.) (argument scheduled for Jan. 13, 1999); *Jurado-Gutierrez* v. *Greene*, No. 97-1437 (10th Cir.) (no argument scheduled); *Pak* v. *Reno*, No. 98-3852 (6th Cir.) (no argument scheduled).

[20] Numerous courts of appeals have previously stated that the only remaining forum is in the district courts. Each held that AEDPA and IIRIRA repealed the courts of appeals' direct review jurisdiction over claims by immigrants deportable for a criminal conviction who challenge the denial of relief from deportation, stated or assumed that habeas corpus jurisdiction (or other avenue) remained available, and invited or instructed immigrants to seek review through such an action. See, e.g., *Lerma de Garcia* v. *INS*, 141 F.3d 215, 217 (5th Cir.), *reh'g denied*, 159 F.3d 1358 (1998) (noting that "criminal deportees retain some opportunity to apply for writs of habeas corpus."); *Turkhan* v. *INS*, 123 F.3d 487, 490 (7th Cir. 1997) (mentioning "possibility of a writ of habeas corpus authorized under" section 2241, the All Writs Act or the Suspension Clause of the Constitution); *Fernandez* v. *INS*, 113 F.3d 1151 (10th Cir. 1997) (observing that the "possibility that habeas jurisdiction exists under Section 2241" remains "open").

Hose, with argument scheduled for March 25, 1999. 1998 Daily Journal D.A.R. 12215 (Dec. 3, 1998). Thus, the only circuit conflict identified by petitioner has been eliminated.[21]

b. As a case arising under IIRIRA's temporary "transitional" judicial review rules, this case does not present the permanent judicial review provisions of IIRIRA and does not raise questions of national importance warranting this Court's review.

This case is governed by the transitional jurisdictional provision, IIRIRA 309(c)(4) and, according to the government,

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[21] The *Hose* decision never presented an actual conflict regarding the jurisdictional issues presented here because *Hose* did not involve the availability of habeas corpus where direct review was statutorily barred. Even before being withdrawn, *Hose* was of no practical significance because the Ninth Circuit ruling in *Magaña-Pizano* resulted in the district courts retaining jurisdiction under 28 U.S.C. § 2241 to review challenges brought by immigrants who cannot obtain direct review under IIRIRA 309(c)(4)(G).

In the circuit courts, the government has submitted *Richardson* v. *Reno*, No. 98-4320, 1998 WL 850045 (11th Cir. Dec. 9, 1998), to support its contention that the district courts lack jurisdiction under Section 2241. *Richardson*, however, is not about review of final orders of deportation because the petitioner in *Richardson* was challenging his detention pending the outcome of his removal proceeding and not a final order. His removal case remains pending in the BIA and no final order of deportation has issued. The Eleventh Circuit's discussion regarding the availability of Section 2241 to review final orders of deportation is therefore entirely dicta. Further, the Eleventh Circuit specifically noted that it was not addressing the scope of review required by the Suspension Clause. See *id.* at *30 n. 182. The jurisdictional questions resolved by the First Circuit in this case remain pending in the Eleventh Circuit in *Gutierrez-Martinez* v. *Reno*, No. 98-8185 and *Mayers* v. *Reno*, No. 97-5537 (11th Cir.) (argued and submitted Oct. 8, 1998). Those consolidated cases involve the identical jurisdictional and merits issues as presented in this case, *Magaña-Pizano* v. *INS*, 152 F.3d 1213 (9th Cir. 1998) and *Henderson* v. *INS*, 157 F.3d 106 (2d Cir. 1998).

one subsection of the permanent provision, Section 1252(g). The rest of the permanent provision does not apply here because this is a "pipeline" deportation case where the administrative proceedings were commenced *before* April 1, 1997. Under IIRIRA, such pipeline deportation (and exclusion) cases are governed by the transitional rules and are not subject to the permanent provision.[22]

The government argues that the permanent counterpart to the applicable transitional provision, Section 1252 (a)(2)(C), is "substantively similar" and that the "courts in the future are *likely* to construe" (Pet. Br. at 19 n.10 (emphasis added)), the permanent provision in light of their interpretation of the transitional rule. But the text of the two provisions is different, and the government has already argued in other cases that judicial decisions under Section 309(c)(4)(G) do not govern the Section 1252(a)(2)(C) permanent provision.[23]

c. The jurisdictional ruling of the court of appeals avoided multiple "serious, novel and complex" constitutional issues.

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[22] Transition cases are also complicated by the intersection of Section 1252(g) and Section 309(c)(4). The interplay of those provisions arises, in a different context, in *Reno* v. *American-Arab Anti-Discrimination Committee*, No. 97-1252 (*AADC*), (argued Nov. 4, 1998). In light of the potential relevance of *AADC*, the Court may wish to hold this petition until it decides *AADC*. *AADC* does not raise the same question as is presented here nor does it, as petitioner correctly states, involve the continued availability of habeas corpus or any question arising under the Suspension Clause. Nonetheless, the Court's analysis of Section 1252(g) in *AADC* may give guidance to the parties on the scope and applicability of that statute in a transitional rule case.

[23] See, e.g., Brief for Respondent-Appellee [INS] at 17-18 n.10, *Esparza-Treto* v. *Greene*, No. 98-1339 (10th Cir.) (filed Nov. 20, 1998) (*Magaña-Pizano* is 'clearly limited to cases under the transitional rules and does not apply to cases under new Section 242") *Bonhometre* v. *Reno*, No. 98cv12333-NG (D. Mass.) (filed Nov. 13, 1998) (asserting that *Goncalves* governs only transitional rule cases).

Pet. App. 28a. The court explained the constitutional problems as (1) the absence of judicial review in relation to the limits of Congress' power under Article III to control the jurisdiction of the federal courts; (2) deciding whether the Suspension Clause permits Congress to repeal Section 2241 review of detention by Executive Branch officers; (3) whether the Suspension Clause unaided by statute provides jurisdiction; and (4) the kinds of claims that would be permitted directly under Suspension Clause jurisdiction. Pet. App. at 28a-29a.

The government tries to avoid these constitutional issues by arguing, without explanation, that Section 309(c)(4)(G) could be "construed" to allow jurisdiction over *constitutional* claims directly in the court of appeals by a petition for review. But even if construing Section 309(c)(4)(G) to allow review of constitutional claims were possible, doing so does not avoid the constitutional questions. The constitutional issue presented by the jurisdictional provisions of AEDPA and IIRIRA is whether judicial review of respondent's *non-constitutional* question of generally applicable statutory interpretation (i.e., whether the statute applies retroactively) can be barred. Construing IIRIRA to allow review of constitutional claims does nothing to avoid that constitutional question.

Given that serious constitutional question, the court of appeals correctly relied on *Felker* v. *Turpin*, 518 U.S. 651 (1996), and *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85 (1869) to find that Congress had not repealed Section 2241. Pet. App. 20a-30a.[24] The First Circuit reviewed the relevant legislative enactments under the *Felker* test. It found that the 1961 legislation did not repeal Section 2241. The legislative history (though limited) confirmed an intent to preserve Section 2241, and the case law after 1961 showed that Section 2241 remained available to

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[24] Other circuit courts have reached the same conclusion. See, e.g., *Jean-Baptiste* v. *Reno*, 144 F.3d 212 (2d Cir. 1998); *Lerma de Garcia* v. *INS*, 141 F.3d 215 (5th Cir.), *reh'g denied*, 159 F.3d 1358 (1998); *Turkhan* v. *INS*, 123 F.3d 487 (7th Cir. 1997).

immigrants facing deportation. Pet. App. 24a-26a. It further found that AEDPA did not effectuate a repeal of Section 2241 because it made no mention of that provision and only eliminated the independent basis for district court habeas corpus actions that had appeared in former Section 1105a(a)(10). See Pet. App. 26a. Finally, the First Circuit concluded that IIRIRA's enactment of Section 1252(g) was not sufficient to repeal Section 2241 because it also failed to mention Section 2241 or habeas corpus. Pet. App. 26a-28a. In particular, the court noted Congress enacted Section 1252(g) after this Court's unanimous and closely-watched *Felker* opinion, thus removing any possible doubt that Congress knew of the necessity for explicit legislation to amend or repeal jurisdiction under Section 2241.[25] Pet. App. 26a.

Application of the *Felker* clear statement rule in this case is appropriate to avoid the historic constitutional questions that the Court would otherwise confront. The clear statement rule of *Felker* is not a formalistic requirement. It acts as a "signpost[], warning Congress that specific types of legislation, such as acts that . . . strip the courts of all jurisdiction, may give rise to constitutional difficulties." *Lee* v. *Reno*, 15 F.Supp. 2d 26, 38 (D.D.C. 1998).

d. Nor are the constitutional questions easy ones, as the government seems to suggest. The constitutional basis for judicial review of respondent's statutory retroactivity and constitutional equal protection claims lies in the Suspension of Habeas Corpus Clause, the Separation of Powers principle of Article III, and the Due Process Clause of the Fifth Amendment. The government asserts that denying review of a statutory claim

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[25] The lack of certainty in AEDPA and IIRIRA is also evidenced by the fact that, as the court below noted, the government itself initially assumed that constitutional-mandated review would be conducted by the district court in the context of a habeas corpus petition. Pet. App. 10a (INS "conceded that there would be some form of habeas jurisdiction in the district court"). See *Henderson* v. *INS*, 157 F.3d 106 (2d Cir. 1998).

governing discretionary relief raises no constitutional issue. Pet. Br. at 21. That is contradicted by decades of consistent judicial adjudication of such claims in habeas corpus proceedings, including by this Court. Habeas corpus is the historic procedure for an alien to challenge an order of deportation. *See Heikkila* v. *Barber*, 345 U.S. 229, 235 (1953) ("Now, as before, [an alien] may attack a deportation order only by habeas corpus"). Under the immigration acts of 1891 and 1917, the statute prohibited judicial review except as "required by the Constitution." *Heikkila*, 345 U.S. at 235. Throughout that period, however, the courts adjudicated habeas corpus actions by resident aliens alleging that a denial of discretionary relief was erroneous because it rested on a misconstruction of the immigration statute, or some other non-constitutional error.

This Court twice reviewed the denial of discretionary deportation relief for *non-constitutional* error shortly after the Court affirmed in *Heikkila* that the habeas review was limited to the constitutional core. *See United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 268 (1954); *United States ex rel. Hintopoulos* v. *Shaughnessy*, 353 U.S. 72 (1957). *Accardi* is especially significant because the Court exercised habeas jurisdiction to review the denial of discretionary relief and granted relief to the immigrant over the specific objection of four dissenting Justices that habeas corpus jurisdiction did not extend to claims arising from discretionary relief. *See Accardi*, 340 U.S. at 269 (Jackson, J., dissenting).[26] The government has not pointed to a single decision of this Court holding that review of legal error governing eligibility for discretionary relief from

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[26] The courts of appeals routinely reviewed claims denying discretionary relief during this period. See, e.g., *Mastrapasqua* v. *Shaughnessy*, 180 F.2d 999 (2d Cir. 1950) (Frank, J.); *United States ex rel. Kaloudis* v. Shaughnessy, 180 F.2d 489 (2d Cir. 1950) (L.Hand, J.). See also *Henderson v. INS*, 157 F.3d 106, 112-17, 121 (2d Cir 1998) (collecting cases); *Magaña-Pizano* v. *INS*, 152 F.3d 1213, 1218-19 (9th Cir. 1998) (same).

deportation is not reviewable in habeas corpus where no other avenue for review is available. Absent an adequate and effective alternative avenue of review,[27] the Suspension Clause requires review of these statutory and constitutional claims.

Judicial review of the legal claim presented here is also grounded in Article III. *See Commodities Future Trading Commission* v. *Schor*, 478 U.S. 833 (1986). Absent some avenue for judicial review, respondent's legal claim would be adjudicated entirely by the Executive Branch without any access, by appeal or otherwise, to an Article III court. This Court has never held that Congress may, consistent with Article III, deprive a litigant of all access to a judicial forum over a generally applicable question of statutory construction where individual liberty is a stake. Likewise, because deportation of a long-time legal resident implicates fundamental interests "basic to human liberty and happiness," *Wong Yung Sung* v. *McGrath*, 339 U.S. 33, 50 (1950); *Ng Fung Ho.* v. *White*, 259 U.S. 276, 284 (1922) (deportation may "result . . . in loss of . . . all that makes life worth living"), the requirements of due process mandate access to a judicial forum to present respondent's retroactivity claim.[28]

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[27] See *Swain* v. *Pressley*, 430 U.S. 372 (1977).

[28] The need for judicial oversight is underscored by the frequency with which immigration decisions are vacated and by the interests at stake in deportation. *Reyes-Hernandez* v. *INS*, 89 F.3d 490, 492 (7th Cir. 1996) (Posner, C.J.) (noting importance of judicial review where courts reverse the BIA "on a nontrivial number of occasions . . ."); *Rodriguez-Roman* v. *INS*, 98 F.3d 416, 432 (9th Cir. 1996) (Kozinski, J., concurring) (stressing the "importance of independent judicial review in an area where administrative decisions can mean the difference between freedom and oppression").

2. The Ruling on the Merits of Section 440(d) Does Not Warrant Review.

The court of appeal's analysis of the temporal reach of the amendments to Section 1182(c) made by Section 440(d) of AEDPA does not warrant review by this Court. First, there is no conflict among the circuits. Second, the decision has limited application because Section 1182(c) has been repealed for deportation proceedings initiated after April 1, 1997, and thus, controversies over the temporal scope of Section 440(d) are relevant only to a closed set of cases. Third, the decision lacks the far-reaching implications asserted by the government. Fourth, the decision is based on an unremarkable and correct application of this Court's recent precedents. Finally, the decision below is based on only one of many arguments against retroactive application of 440(d) that have not been fully developed in the lower courts.

a. There is no conflict in the circuits. Only the First and Second Circuits have reviewed the Attorney General's conclusion that Section 440(d) applies retroactively. Pet. App. 38a-57a; *Henderson* v. *INS*, 157 F.3d 106, 128-30 (2d Cir. 1998). Both have concluded that her reading of the statute is erroneous as a matter of law.[29] Given the uniformity in the circuit courts, there is no reason for the Court to take, within the span of two terms, a third case concerning the application of the Court's established retroactivity test to a particular statutory provision. *See Lindh* v. *Murphy*, 521 U.S. 320 (1997) (determining whether a particular provision of AEDPA concerning habeas petitions applies retroactively under test established in *Land-*

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[29] Numerous district courts have agreed that Section 440(d) should not be applied retroactively to cases pending on AEDPA's enactment. See, e.g., *Perez* v. *Reno*, 18 F.Supp.2d 674 (W.D.Tex. 1998); *Lee* v. *Reno*, 15 F.Supp.2d 26 (D.D.C. 1998); *Pak* v. *Reno*, 8 F.Supp.2d 1001 (N.D. Ohio 1998); *Sandoval* v. *Reno*, No. 97-7298, 1997 WL 839465 (E.D. Pa. 1997).

graf v. *USI Film Prods.*, 511 U.S. 244 (1994)); *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939 (1997) (determining whether a 1986 amendments to the False Claims Act apply retroactively under *Landgraf* test).

b. The decision below has limited applicability. Section 1182(c) has been replaced by a new form of relief called "cancellation of removal" which governs all removal cases initiated after April 1, 1997. *See* IIRIRA § 304(b), 8 U.S.C. § 1229b (Supp. II 1996). Thus, the lower court's ruling applies to a closed and diminishing set of cases, those commenced prior to April 1, 1997, and will have no permanent impact on the administration of the immigration laws or the future availability of relief for lawful permanent residents convicted of crimes. Those aliens who are currently serving state or federal sentences are governed by the new "cancellation of removal" provision in IIRIRA unless proceedings against them were commenced prior to April 1, 1997.

c. The court of appeal's analysis does not have the "far-reaching ramifications" asserted by the government. Pet. Br. 25. The government contends that the decision below establishes a new presumption against retroactive application of immigration statutes and asserts that such a presumption conflicts with precedents of this Court, *see* Pet. Br. 25 (citing *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984)), and the decisions of some courts of appeals (including the First Circuit) with respect to the 1990 amendments to Section 1182(c). The government's contention, however, is based on a misreading of the opinion below.

The court of appeal's ruling was *not* based on its view that a provision governing discretionary relief from deportation is subject to the presumption against retroactivity (a view that, in any event, is correct under this Court's recent decision in *Hughes*). Rather, the court of appeals made clear that its ruling hinged on the specific text, structure and legislative history of AEDPA's amendments, which showed that, as a matter of con-

gressional intent, AEDPA Section 440(d) does not apply to respondent. Pet. App. 41a-57a. Indeed, the court of appeals expressly stated that "[e]ven if Supreme Court precedent" supported the Attorney General's view that the presumption against retroactivity was inapplicable to provisions governing discretionary relief from deportation, the *result* would have been the same because of the manner in which Congress chose to draft the statute. Pet. App. 49a. *See also* Pet. App. 57a ("We have . . . determined through a careful reading of AEDPA's text, confirmed by its legislative history" that Section 440(d) does not apply to respondent). Thus, even assuming that the court of appeals erred in its assumption that Section 440(d)'s amendments to Section 1182(c) triggered the presumption against retroactivity, the result would have been precisely the same. And, because the result in this case rested on Congress's intent as to this particular statute, the court of appeal's opinion has little applicability for cases involving other statutory provisions.[30]

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[30] Because the result below did not hinge on the court of appeal's conclusion that the amendments to Section 1182(c) raised retroactivity concerns triggering the presumption against retroactivity, that conclusion, even if erroneous, would not warrant this Court's attention. Respondent nonetheless notes that the court's conclusion about the applicability of the presumption was, in fact, correct in light of this Court's recent decisions in *Lindh* and *Hughes*. See also *Henderson* v. *INS*, 157 F.3d 106, 129 (2d Cir. 1998) (stating Second Circuit's inclination to view application of 440(d) to cases pre-dating AEDPA as a genuinely retroactive effect triggering presumption against retroactivity, but following First Circuit analysis and holding that regardless of whether presumption applies, Section 440(d) should not apply to cases commenced before AEDPA's passage in light of the statute's text, structure and legislative history).

This Court's decision in *INS* v. *Lopez-Mendoza*, cited by the government (Pet. Br. 25), does not stand for the proposition that immigration statutes generally, or discretionary relief statutes in particular, will never trigger the presumption against retroactivity. *Lopez-Mendoza* was de-

d. The decision below is based on a straightforward application of this Court's decisions in *Landgraf* v. *USI Film Prods.*, 511 U.S. 244 (1994), *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939 (1997) and *Lindh* v. *Murphy*, ___ U.S. ___, 117 S.Ct. 2059 (1997). Both the court below and the Second Circuit in *Henderson* v. *INS*, 157 F.3d 106 (2d Cir. 1998), found that, based on an analysis of the text and structure of Title IV of AEDPA, Congress did not intend retroactively to strip lawful permanent residents of their statutory eligibility to seek relief from deportation. The government does not argue that the court misapprehended the analysis required under this Court's precedents. It simply disagrees with the courts' conclusions as to this particular statute.

In *Lindh* v. *Murphy*, the Court made clear that the first inquiry in a case concerning disputed retroactivity is an examination of the statute's text and history to determine Congress's intent. A court is to employ the "normal rules of construction" and should consider both express evidence of Congress's intent and evidence that is implied by analyzing related provisions and other ordinary tools of statutory construction. *Lindh*, 117 S.Ct. at 2063. If Congress' intent to avoid retroactive application can be discerned from such an analysis, "there is no need

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cided before *Landgraf*, *Hughes* and *Lindh*, and far more importantly, did not remotely involve a retroactivity issue. See *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1034 (1984) (question presented is "whether an admission of unlawful presence in this country made subsequently to an allegedly unlawful arrest must be excluded as evidence in a civil deportation hearing."). Notably, *Landgraf* itself relied on examples from immigration statutes to illustrate the presumption against retroactivity. See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 271-72 (1994). To the extent that there are lower court cases that held that the 1990 amendments to Section 1182(c) did not trigger the presumption against retroactivity, see Pet. Br. 25 (citing cases), those decisions (as well as the Attorney General's decision in *Soriano*) also pre-dated *Landgraf*, *Hughes* and *Lindh*.

to resort to judicial default rules." *Landgraf*, 511 U.S. at 280. The First Circuit applied exactly that process and reached the correct result.

In particular, in AEDPA Sections 413 and 421, Congress used language mandating full retroactivity for provisions that denied terrorists the possibility of obtaining relief from deportation. No such retroactivity language was included for Section 440(d). Where Congress chose to deviate from the principle of prospectivity it did so with explicit language and specified the degree of retroactivity it intended. *See* Pet. App. 51a; *see also Henderson*, 157 F.3d 106, 128-30 (2d Cir. 1998) (agreeing with First Circuit's analysis and conclusion regarding text, structure and history of AEDPA Section 440(d)).

The government suggests that the First Circuit ignored other specific provisions of Title IV that contained language mandating prospective application and that such language would not have been necessary if Congress intended only prospective application for provisions, like Section 440(d), that are silent as to their temporal reach. Pet. Br. 26-27 (citing AEDPA 435(b), 440(f), and 441(b)). But, as the court of appeals noted, Sections 413 and 421, like Section 440(d), are concerned with "relief from deportation," Pet. App. 44a, and therefore are the most relevant comparative provisions. They show that when Congress wanted to impose the type of full retroactivity sought by the government, it knew how to do so. The First Circuit understood that those provisions are "particularly helpful" in determining the reach of Section 440(d). Pet. App. 44a. Furthermore, as other courts have shown, each of the provisions of Title IV of AEDPA that contained language specifying their temporal scope, including each of the provisions cited by the government, was in some degree retroactive. *See Mojica* v. *Reno*, 970 F. Supp. 130, 172-73 (E.D.N.Y. 1997), *aff'd sub nom Henderson* v. *Reno*, 157 F.3d 106 (2d Cir. 1998); *Sandoval* v. *Reno*, 1997 WL 839465, at *11 (E.D. Pa. 1997). Congress's silence as to Section 440(d) therefore cannot reasonably

be read as adopting the most extreme retroactivity provisions found in Sections 421 and 413.

The government also tries to minimize the legislative history showing that Congress rejected the precise type of retroactivity that the Attorney General is seeking to impose. Pet. Br. 27 n.17. This history shows that the conference chose to adopt the substantive scheme from the Senate bill and the retroactivity scheme from the House bill. Pet. App. 52a-55a. Had the conference sought to achieve the type of full retroactivity found in the Senate bill, it would have not have removed the language that called for such full retroactivity.

Finally, the government contends that the court of appeals should have deferred to the Attorney General's conclusion that Section 440(d) applies to all pending applications. Pet. Br. 27. The court of appeals assumed that the *Chevron* deference doctrine applied to the Attorney General's opinion, but found that the text and history of the statute answered the question. Pet. App. 39a-41a. The government simply disagrees with the court of appeals's analysis of the text, structure and history of the statute.[31]

e. The merits issue is not sufficiently developed in the courts of appeals to warrant the Court's review. Even if this Court were to reject the First and Second Circuit's analysis of the text and structure of the statute, it would face additional arguments against reading Section 440(d) to apply retroactively. These arguments have not been fully developed in the

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[31] Although the court of appeals assumed that *Chevron* deference was applicable, there was, in fact, no statutory interpretation by the Attorney General to which a court could defer. The Attorney General improperly looked only at whether there was express retroactivity language in Section 440(d) itself, and did not examine other provisions of AEDPA, nor did she examine the legislative history of AEDPA's amendments. As *Lindh* made clear in a decision issued after the Attorney General ruled, the Attorney General was required to utilize all the normal tools of statutory construction.

lower courts. First, the Court would face the second step of the *Landgraf* analysis if it determined that, contrary to the conclusion reached by the First and Second Circuits, the temporal reach of Section 440(d) could not be determined through an examination of AEDPA's text, structure and amendments. This second step requires a determination whether the presumption against retroactivity is applicable. The applicability of the second stage of *Landgraf* analysis has been addressed by the district courts, but has not been fully developed in the courts of appeals. *See, e.g., Wallace* v. *Reno*, No. 98-11182-NG, 1998 U.S. Dist. LEXIS 16807 (D. Mass. Oct. 7, 1998) (applying *Landgraf*); *Hsue Li Lee* v. *Reno*, 15 F. Supp. 2d 26, 56 (D.D.C. 1998); *Mojica* v. *Reno*, 970 F. Supp. 130, 173-80 (E.D.N.Y. 1997); *cf. Henderson* v. *Reno*, 157 F.3d 106, 128 (2d Cir. 1998) (noting that it is inclined to believe that 440(d) is "genuinely retroactive" but not reaching issue).

Finally, if Section 440(d) applied retroactively, it would violate Equal Protection. Of the few district courts that have agreed with the government that Section 440(d) applies retroactively, virtually all have found that barring relief for lawful permanent residents in deportation proceedings is a denial of Equal Protection because those same lawful permanent residents would have been eligible to apply for relief if they had taken a trip out of the country and been put in exclusion proceedings on their return. *See, e.g., Thompson* v. *Perryman*, No. 98C1596, 1998 U.S. Dist. LEXIS 12527, at *30 (N.D. Ill. Aug. 5, 1998); *Avelar-Cruz* v. *Reno*, 6 F. Supp. 2d 744, 757 (N.D. Ill. 1998); *Jurado-Gutierrez* v. *Greene*, 977 F. Supp. 1089, 1093 (D. Colo. 1997). This equal protection problem further counsels in favor of the First and Second Circuits' ruling that Section 440(d) does not apply retroactively.

3. Finally, if the Court were to grant review on the jurisdictional issue, the Court should grant review in *Magaña-Pizano* v. *INS*, No. 98-0836. In *Magaña-Pizano*, the respondent sought judicial review both directly in the Ninth Circuit by means of a

petition for review and in district court by means of habeas corpus. *Magaña-Pizano* assures the Court that it would be squarely presented with the jurisdiction of both the courts of appeals and the district courts to hear respondent's claims.

CONCLUSION

For the reasons set forth herein, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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